(1)

88-357

No. _____

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1988

NORM MALENG, King County Prosecuting Attorney; AMOS E. REED, Secretary of the Washington State Department of Social & Health Services; KENNETH O. EIKENBERRY, Attorney General,

Petitioners,

v.

MARK EDWIN COOK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does the District Court have subject matter jurisdiction over a § 2254 challenge to a conviction when the sentence involved has expired, but the conviction itself may have been used to enhance a subsequent unrelated state minimum term setting or in setting a subsequent federal prison term?

LIST OF PARTIES

The Petitioners, Norm Maleng, King County Prosecuting Attorney; Amos E. Reed, Secretary of the Washington State Department of Social and Health Services; and Kenneth O. Eikenberry, Attorney General, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on June 2, 1988.

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No. _____

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OPINIONS BELOW

The Opinion filed on June 2, 1988, by the United States Court of Appeals for the Ninth Circuit, reversing and remanding for further proceedings, appears in Appendix A. The Order of the United States District Court for

the Western District of Washington adopting the Magistrate's Report and Recommendation and dismissing Mr. Cook's petition for writ of habeas corpus for lack of subject matter jurisdiction appears in Appendix B. The Magistrate's Report and Recommendation appears in Appendix C.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on June 2, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Habeas Corpus statute regarding remedies in Federal courts for petitioners in State custody, 28 U.S.C. § 2254. (The above provision is set forth in Appendix D attached hereto.)

STATEMENT OF THE CASE

Respondent, Mark Edwin Cook, is currently serving a thirty year federal sentence for Bank Robbery and Conspiracy. In 1958, a jury in Washington State court convicted Mr. Cook of three counts of Robbery. He was sentenced to three concurrent twenty year terms of imprisonment and was thereafter paroled in 1962.

While on parole in 1965, Mr. Cook was again convicted in Washington State court of three counts of Robbery, and sentenced to three concurrent fifty year terms. He was then again paroled in 1973. In 1976, while on parole, Mr. Cook was convicted of the federal crimes leading to his current incarceration.

Mr. Cook was also convicted in Washington State court in 1976 of two counts of First Degree Assault and one count of Aiding a Prisoner to Escape. The Washington State court thereafter sentenced Mr. Cook to two life terms and one ten year term of imprisonment. These sentences were maximum terms in Washington's then indeterminate sentencing scheme, with the minimum term to be set by the Board of Prison Terms and Paroles. Since Mr. Cook had a prior felony conviction, his minimum term was required to be set two and one-half years longer than would otherwise be the case.[1] Because Mr. Cook could not serve that sentence until his release from federal prison, the State of Washington has placed a detainer against him requesting federal prison authorities to notify the State when Mr. Cook's federal term expires.

In 1985—twenty-seven years after his 1958 conviction and seven years after the expiration of his sentence thereon—Mr. Cook filed his present federal habeas petition, pursuant to 28 U.S.C. § 2254, challenging that 1958 conviction. He alleged that his 1958 conviction had been used illegally to enhance both his 1976 federal sentence and 1978 state sentences because he was never given a competency hearing in 1958. The District Court adopted the Magistrate's Report and Recommendation and granted the state's motion to dismiss the petition for lack of subject matter jurisdiction due to the expiration of the 1958 sentence. Mr. Cook then filed a timely notice of appeal and the circuit court issued a certificate of probable cause.

In examining Mr. Cook's petition, the circuit court found that the 1958 conviction might have lengthened his 1978 minimum term by as much as seven and one-half years.[2] This collateral consequence of the expired 1958 conviction upon the unserved 1978 minimum term led the circuit court to find that the district court did have subject matter jurisdiction to entertain Mr. Cook's petition be-

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[1] RCW 9.95.040(4) gives the Board the authority to waive Mr. Cook's mandatory minimum term and parole him prior to such term's expiration. RCW 9.95.040 is set forth in Appendix E.

[2] This is an incorrect statement of Washington Law. RCW 9.95.040 required Mr. Cook's minimum term to be set at five years due to his use of a deadly weapon in the course of committing the crimes for which he was sentenced in 1978. His prior felony conviction required this minimum term to be increased two and one-half years for a total of seven and one-half years. Mr. Cook would have been subject to this two and one-half year increase regardless of the 1958 conviction because of his 1965 felony convictions.

cause such a collateral consequence was enough to meet the in custody requirement of 28 U.S.C. § 2254(a).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Ninth Circuit has adopted a rule that essentially means that state court convictions are never final.

This case presents the court with an important question of federal law that affects every state in the union and upon which the circuit courts have divided. At what point will a state be relieved from the obligation of defending a collateral attack on a criminal conviction where sentence has expired?

The Ninth Circuit's decision held that the district court had subject matter jurisdiction to entertain Mr. Cook's habeas challenge of his expired 1958 conviction. The court reasoned that since the 1958 conviction "might" increase Mr. Cook's minimum term on a subsequent state conviction, although not addressing whether it would increase his current federal term, he was "in custody" on the 1958 conviction for purposes of 28 U.S.C. § 2254 subject matter jurisdiction. Petitioners respectfully assert the district court was in fact without subject matter jurisdiction to hear Mr. Cook's collateral challenge to his expired 1958 conviction because he no longer was in custody on the challenged conviction when his petition was filed. Further, the possibility that the 1958 conviction might lengthen the minimum term of his subsequent state sentence or may have been considered in his subsequent federal sentencing are collateral consequences too attenuated and indirect for this court to find Mr. Cook "in custody" for purposes of 28 U.S.C. § 2254 subject matter jurisdiction.

The general nature of the habeas corpus writ from the time of its common law origin was to provide a remedy for the unlawful imprisonment of an individual. *Fay v. Noia*, 372 U.S. 391 (1963). As a direct result, the statutes governing federal habeas corpus and the rules that were enacted to enforce that procedure were consistently drafted to re-

quire that the individual seeking relief by way of a habeas corpus petition be a person "in custody". *See*, 28 U.S.C. § 2241(c)(3); 28 U.S.C. § 2254(a)(b)(d); § 2254, Rule 1(a)(1-2); § 2254, Rule 2(a) and (b).

It is apparent from the early cases that the "in custody" requirement for habeas corpus was originally construed to mean actual confinement or the present means of enforcing confinement. *Wales v. Whitney*, 114 U.S. 564 (1885).

More recently, the courts have taken a somewhat more liberal view of the degree of restraint on personal liberty that is necessary to satisfy the "in custody" requirement of § 2254. As a result, a prisoner placed on conditional parole has been held to be "in custody" within the meaning of 28 U.S.C. § 2241(c). *Jones v. Cunningham*, 371 U.S. 236 (1963).

The *Jones* court went on to hold "* * * English courts have long recognized the writ as a proper remedy even though the restraint is something less than close physical confinement." *Id.* at 238. The court stated further:

> * * * history, usage, and precedent can leave no doubt that besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English speaking world to support the issuance of habeas corpus.

Id. at 240

With the above case as authority, the concept of custody for purposes of habeas corpus has been expanded considerably. The writ has been made available to individuals who have been placed on probation, *Benson v. California*, 328 F.2d 159 (9th Cir. 1964), *cert. den.* 380 U.S. 951 (1965), or released on their own recognizance, *Hensley v. Municipal Court*, 411 U.S. 345 (1973).

Finally, in *Carafas v. LaVallee*, this Court held that if a petitioner is in custody at the time that his application for habeas corpus relief is filed, federal jurisdiction is not defeated by his unconditional and immediate release from incarceration, if his release occurs prior to completion of

the proceedings on the habeas corpus petition. *Carafas v. LaVallee*, 391 U.S. 234 (1968).

These cases follow a common line of reasoning. The habeas petitioner is under some meaningful restraint stemming directly from the conviction the petitioner is now attacking at the time the petition is filed. This reasoning cannot be applied to the case at bar where the petitioner challenges a conviction twenty-seven years and three sets of felony convictions after trial, as well as seven years after the sentence thereon has expired.

Petitioner does not allege that his 1965, 1976 or 1978 felony convictions were unlawful, only that there possibly was an enhancement of his 1976 and 1978 sentences, stemming from convictions in no way related to his 1958 conviction. Thus, Mr. Cook's situation is different from the case of an offender in a habitual criminal trial where the prior conviction itself may be an actual element of the subsequent criminal charge. Such a direct consequence is absent in the case at bar.

However, several circuits have dealt with petitions where the petitioner was no longer under direct restraint stemming from the conviction now under attack, but was still being affected by some collateral consequence of that conviction, and found subject matter jurisdiction to be lacking.

In *Cotton v. Mabry*, 674 F.2d 701 (8th Cir. 1982), *cert. denied*, 459 U.S. 1015 (1982), the Eighth Circuit addressed the issue of the dismissal, for lack of subject matter jurisdiction, of a habeas petition because the petitioner had served his sentence prior to filing his petition and thus was no longer in custody. The district court found, and the circuit court held, that even though the conviction may have prolonged a subsequent unrelated state sentence, the petitioner was not "in custody" as required by 28 U.S.C. § 2254.

In the case at bar, the district court relied upon *Harris v. Ingram*, 683 F.2d 97 (4th Cir. 1982) where the Fourth Circuit examined the dismissal of a habeas petition attacking a state conviction filed after his unconditional

release from sentence. Again, the district court found, and the circuit court held, that even though the conviction may have enhanced petitioner's subsequent federal sentence, he was not "in custody" on that prior conviction, thus the jurisdictional requirement of 28 U.S.C. § 2254 was not met.

The Sixth Circuit, in deciding a case almost identical to the case at bar and upon which the district court also relied in dismissing Mr. Cook's petition, examined the jurisdictional "in custody" requirement of 28 U.S.C. § 2254 in *Ward v. Knoblock*, 738 F.2d 134 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985). The circuit court upheld the district court's dismissal of the petition because he was no longer in custody, as required by 28 U.S.C. § 2254, on the conviction's sentence, even though the conviction under attack may affect his parole eligibility on his present unrelated federal sentence and he is subject to future state custody stemming from an unrelated state detainer.

Other circuits have viewed the in custody jurisdiction requirement in a more liberal fashion. *See, Jackson v. State of Louisiana*, 452 F.2d 451 (5th Cir. 1971); *Aziz v. LeFeure*, 830 F.2d 184 (11th Cir. 1987); *Lyons v. Brierly*, 435 F.2d 1214 (3rd Cir. 1970); and *United States v. LaVelle*, 330 F.2d 303 (2nd Cir. 1964).

2. **The rule established by the Court of Appeals provides a disincentive to the states to establish a structured means of arriving at a just and equitable sentence utilizing prior criminal convictions.**

The liberal view of the "in custody" requirement, as adopted by the Ninth Circuit, serves as a disincentive to states to adopt structured sentencing schemes. Washington has adopted, as have other states and the federal government, a system of sentencing that requires the court to look to objective factors in arriving at a sentence for a given offender.[3] Such schemes virtually all look to past criminal convictions as one of the factors to be considered

[3] *See*, Chapter 9.94A, Revised Code of Washington, 9.94A.310 - 9.94A.370.

in arriving at a just and equitable sentence.[4] The alternative to such schemes is to leave sentencing to the unfettered discretion of the sentencing court.

Without some point where a criminal judgment will be considered final, the states will never be relieved of the burden of defending prior convictions if used in subsequent sentencings. Such a policy would be a disincentive to the states to structure and objectify their criminal sentencing schemes. Both the defendant and the public are better served by a sentencing system that limits discretion by directing the court to base a criminal sentence on objective factors, set out in advance.

3. **The Court of Appeals' decision in the case at bar provides career criminals with an incentive to attack their early criminal convictions with false allegations at a time when the state may be unable to refute such allegations because of the unavailability of records and testimony of officials and participants in the trial.**

Although addressing a different factual aspect of the "in custody" requirement in federal habeas proceedings, this Court made several observations in *Peyton v. Rowe*, 391 U.S. 54 (1968), that are relevant to the case at bar.

In holding that a state prisoner was in custody to attack the legality of a consecutive sentence prior to commencement of said sentence, the *Peyton* Court explained the dangers of waiting twenty years before litigating matters involving factual issues. The lengthy period of time involved prior to litigating factual issues leads to "dimmed memories or the death of witnesses [that] is bound to render it difficult or impossible to secure crucial testimony on

[4] *See*, California Penal Code § 1170; Delaware Code Annotated Title 11, Chapter 42; District of Columbia Court Rules 32; Florida Statutes Annotated, Chapter 921; Annotated Code of Maryland, Rule 4-342, 4-343; Annotated Laws of Massachusetts § 279; Michigan Statutes Annotated § 28; Minnesota Statutes Annotated § 244 App.; Purdon's Pennsylvania Forms § 42; General Laws of Rhode Island § 12-19; Utah Code Annotated § 77; Vermont Revised Criminal Procedure 32; Wisconsin Statutes Annotated, Chapter 973.

disputed issues of fact." *Id.*, at 62. The *Peyton* Court went on to state that "postponement of the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice." *Id.* (Footnote omitted).

The *Peyton* Court was mindful of and quoted from the circuit court's analysis of the case below. The circuit court had observed:

> Years hence, the prisoner, at least, may be expected to give testimonial support to the allegations of his petition, but if they are false in fact, the Commonwealth of Virginia may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial. The greater the lapse of time, the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary.
>
> It is to the great interest of the Commonwealth and to the prisoner to have these matters determined as soon as possible when there is the greatest likelihood the truth of the matter may be established.

Id., at 62-63 (citation omitted).

In the case at bar, Mr. Cook filed his petition challenging his 1958 conviction twenty-seven years after being sentenced. The circumstances are just as predicted by the *Peyton* Court. Mr. Cook has made factual allegations and is willing to give testimonial support to these allegations. The state is unable to locate the complete state court records or the doctors involved. None of the attorneys for the prosecution or the defense have any recollection of a competency issue at Mr. Cook's 1958 trial. CR 10, at Affidavit of Michael P. Lynch. Thus, the state will be extremely prejudiced in its efforts to answer Mr. Cook's allegation.

The rule adopted by the Ninth Circuit enables an offender, who has embarked on a criminal career spanning more than thirty years, to now go back and challenge his early convictions in hopes of lessening his period of confinement on one or more subsequent, unrelated convictions. The State submits that such is not "substantial justice." Neither the history of the Great Writ or this Court's prior decisions stand for such an abuse where, as

here, the offender had two decades to present this issue to a federal court while still in custody.

CONCLUSION

It is up to this Court to resolve this important question of federal law that has caused confusion and division in the various circuits which have addressed the issue. There must be a point beyond which finality of judgments will over-ride attenuated, collateral effects of those judgments. For the above stated reasons, petitioners pray that this Court grant certiorari and establish that point.

DATED this _____ day of _____, 1988.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-4151

D.C. No.
C85-1943D

OPINION

MARK EDWIN COOK,
Petitioner-Appellant,

v.

NORM MALENG, KING COUNTY PROSECUTING ATTORNEY; AMOS E. REED, SECRETARY OF THE WASHINGTON STATE DEPARTMENT OF SOCIAL & HEALTH SERVICES; KENNETH O. EIKENBERRY, ATTORNEY GENERAL,
Respondents-Appellees.

Appeal from the District Court
Western District of Washington
CAROLYN DIMMICK, District Judge, Presiding

Argued and Submitted
March 8, 1988—Seattle, Washington

Filed June 2, 1988

Before: THOMAS TANG and WILLIAM C. CANBY, JR., Circuit Judges, and JESSE W. CURTIS,* District Judge.

Per Curiam

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* The Honorable Jesse W. Curtis, Senior United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Criminal Sentencing/Habeas Corpus

Appeal from denial of habeas corpus. The court reversed and remanded holding that the custody requirement for habeas corpus relief is satisfied where a prisoner's prior conviction, although expired, is used to enhance the sentence on a current or future term.

In 1958 and in 1965, a Washington state jury convicted appellant Cook of armed robbery. In 1976, while on parole, Cook was again convicted of bank robbery and conspiracy and is currently serving a 30-year federal sentence. Cook also was convicted in Washington state in 1976 for assault and aiding a prisoner to escape. In 1978, the state sentenced Cook to two life terms and one ten-year term; his sentence was lengthened because of his prior convictions. Cook filed this habeas petition in 1985, alleging that his 1958 conviction had been used illegally to enhance both the 1976 federal and 1978 state sentences. The district court granted the state's motion to dismiss the petition.

[1] This circuit has not previously decided whether satisfaction of the custody requirements to allow an attack on a current sentence ,necessarily satisfies the custody requirements to allow an attack on an earlier conviction used to enhance the sentence for the later conviction. A prisoner "in custody" under one conviction is "in custody" to attack an earlier conviction used to enhance the sentence for the later conviction. **[2]** Here, Cook is under a detainer because of a state conviction which was lengthened because of his 1958 conviction; Cook is thus meaningfully restrained by the 1958 conviction. **[3]** Because Cook's 1958 conviction lengthened his 1978 sentence, Cook is "in custody" for the purposes of a habeas corpus attack on the 1958 conviction, and the district court erred in dismissing Cook's petition for want of subject matter jurisdiction.

COUNSEL

John Midgley, Smith, Midgley & Pumplin, Seattle, Washington for the petitioner-appellant.

Charles S. Faddis, Assistant Attorney General, Olympia, Washington, for the respondents-appellees.

OPINION

PER CŪRIAM:

Mark Edwin Cook, a federal prisoner, appeals pro se the dismissal for lack of subject matter jurisdiction of his 28 U.S.C. § 2254 habeas petition. Cook alleges that the district court erred in finding that he was not sufficiently "in custody" to confer subject matter jurisdiction over his challenge to a 1958 state conviction. We agree.

BACKGROUND

Cook is currently serving a 30-year federal sentence for bank robbery and conspiracy. In 1958, a jury in Washington state court convicted Cook of three counts of armed robbery; the state sentenced Cook to three concurrent 20-year terms of imprisonment and paroled him in 1962.

While on parole in 1965, Cook was convicted in Washington state court of three counts of robbery, and sentenced to three concurrent 50-year terms; he was paroled from this sentence in 1973. In 1976, while on parole, Cook was convicted of the federal crimes leading to his current incarceration.

Cook was also convicted in Washington state court in 1976 of two counts of first-degree assault and one count of aiding a prisoner to escape. In 1978, the state sentenced Cook to two life terms and one ten-year term of imprisonment; Cook's sentence was lengthened by two and one-half years because of his prior convictions. Because Cook could not serve that sentence until his release from federal incarceration, the Washington Department of Prisons placed a detainer on him, requesting the federal prison to notify the state when Cook's federal term expires.

Cook filed this habeas petition in 1985, alleging that his 1958 conviction had been used illegally to enhance both

the 1976 federal and 1978 state sentences.[1] The district court granted the state's motion to dismiss the petition. Cook timely filed a notice of appeal, and this court issued a certificate of probable cause.

ANALYSIS

This court reviews de novo the district court's dismissal for lack of subject matter jurisdiction. *See Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 768 (9th Cir. 1986).

The district court has jurisdiction over habeas petitions under 28 U.S.C. § 2241, which provides, in part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless. * * * (3) He is *in custody* in violation of the Constitution or laws or treaties of the United States* * *

28 U.S.C. § 2241(c) (emphasis added); *see also* 28 U.S.C. § 2254(c). Cook contends that the district court had jurisdiction to adjudicate his challenge to his 1958 conviction because that conviction was used to enhance the sentences for the 1976 federal and state convictions. The state argues that Cook was not "in custody" for the purpose of attacking the 1958 conviction when he filed his federal habeas petition in 1985 because the 20-year sentence for Cook's 1958 conviction had expired in 1978.

When he filed this federal habeas petition in 1985, Cook was under a state detainer to serve his 1978 state sentence. The district court clearly had subject matter jurisdiction over Cook's attack on his 1978 sentence and the state concedes this point. *Rose v. Morris*, 619 F.2d 42, 43 (9th Cir. 1980); *Peyton v. Rowe*, 391 U.S. 54, 67 (1968) ("[A] prisoner serving consecutive sentences is 'in custody' under any one of them* * *").

[1] This circuit has not previously decided whether satisfaction of the custody requirements to allow an attack on a current sentence necessarily satisfies the custody requirements to allow an attack on an earlier conviction used

[1] Cook challenges the 1958 conviction on the ground that he was never given a competency hearing, even though the trial judge found that there was reasonable doubt as to Cook's competence to stand trial. The merits of that claim are not at issue in this appeal.

to enhance the sentence for the later conviction. We agree with the reasoning of those courts that have held that a prisoner "in custody" under one conviction is "in custody" to attack an earlier conviction used to enhance the sentence for the later conviction. *See, e.g., Anderson v. Smith*, 751 F.2d 96, 100 (2d Cir. 1984) (where a prior conviction "may lengthen [the prisoner's] time in prison, he is "in custody" pursuant to that conviction for the purposes of habeas corpus jurisdiction"); *Harrison v. Indiana*, 597 F.2d 115, 116-117 (7th Cir. 1979) (jurisdiction to hear attack on a conviction if its invalidation would shorten current incarceration); *Lyons v. Brierly*, 435 F.2d 1214, 1215-1216 (3d Cir. 1970) (habeas jurisdiction over attack on prior conviction); *Capetta v. Wainwright*, 406 F.2d 1238, 1239 (5th Cir.) (jurisdiction over attack on first conviction if current sentence reduced by invalidation), *cert. denied*, 396 U.S. 846 (1969); *cf. Ward v. Knoblock*, 738 F.2d 134, 139 (6th Cir. 1984) (a prisoner is "in custody" to attack an illegally enhanced impending federal sentence in a 28 U.S.C. § 2255 proceeding), *cert. denied*, 469 U.S. 1193 (1985).

[2] The magistrate, whose recommendation forms the basis of the district court's decision, relied on *Harris v. Ingram*, 683 F.2d 97, 98 (4th Cir. 1982), a case distinguishable from the instant appeal. *Harris* involved an attack *only* on a federal sentence which was dismissed because it should have been brought in a 28 U.S.C. § 2255 proceeding. Moreover, the district court's reliance on *Ward v, Knoblock*, 738 F.2d 134 (6th Cir. 1984) *cert. denied*, 469 U.S. 1193, is also misplaced. In *Ward*, the court held that a prisoner is not "in custody" to attack a conviction where that conviction has been fully served and no longer places any "meaningful" restraint on the prisoner. *Ward*, 738 F.2d at 138. The court went on to conclude, however, that a prisoner is in custody to attack the legality of a sentence *not yet served* because a pending incarceration is a meaningful restraint. *Ward*, 738 F.2d at 139. Here, Cook is under a detainer because of a state conviction which was

lengthened because of his 1958 conviction; Cook is thus meaningfully restrained by the 1958 conviction.

[3] In this case the state used Cook's 1958 conviction to enhance his 1978 sentence. *See* Wash. Rev. Code §§ 9.95.040 (1988), 9.41.025 (repealed 1984)(enhancement statutes); *see also*, Wash. rev. Code § 10.01.040 (1980 & Supp. 1988) (general criminal penalty "savings" statute). Cook is challenging the use of the 1958 conviction to enhance that sentence. If the 1958 conviction is invalid, it should not have been used to enhance the 1978 sentence. *See State v. Gonzales*, 103 Wash. 2d 564, 567, 693 P.2d 119, 121 (1985) (state must prove validity or prison conviction used to enhance sentence); *State v. Barnes*, 42 Wash. App. 56, 57, 708 P.2d 414, 415 (1985). If the enhancement of the 1978 sentence is invalid, the length of Cook's impending state imprisonment might be reduced by as much as seven and one-half years. *See* Wash. Rev. Code §§ 9.95.040(2), 9.41.025. Therefore, because Cook's 1958 conviction lengthened his 1978 sentence, Cook is "in custody" for the purposes of a habeas corpus attack on the 1958 conviction, and the district court erred in dismissing Cook's petition for want of subject matter jurisdiction. *See* 28 U.S.C. § 2241(c)(3), 2254(b); *Anderson*, 751 F.2d at 100.[2]

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[2] The state argues that the enhancement argument goes to the issue of "mootness" rather than the "in custody" requirement. *See Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). Those cases which treat the problem of "collateral consequences" as a mootness issue do not involve sentence enhancement, but instead the civil or other ramifications of a conviction and sentence where the prisoner *has been released from state custody*. *See e.g., Lane v. Williams*, 455 U.S. 624, 630-631 (1982); *Aaron v. Pepperas*, 790 F.2d 1360, 1361 (9th Cir. 1986). The 1958 conviction was used to increase the length of a term of imprisonment Cook *has yet to serve*, such a "collateral consequence" establishes the district court's subject matter jurisdiction over a challenge to the 1958 conviction.

This proposition also finds support in this court's recent decision in *Myers v. Parole Commission*, 813 F.2d 957 (9th Cir. 1987). In *Myers*, this court noted, in dicta, that "[w]e have also held that the collateral consequences of a conviction may in some cases be sufficient to satisfy the "in custody" requirement even though the habeas petitioner is not in custody for the conviction he seeks to challenge when he files the habeas petition." *Myers*, 813 F.2d at 959; *see Braun v. Rhay*, 416 F.2d 1055, 1059 (9th Cir. 1969); *Arketa v. Wilson*, 373 F.2d 582, 584-85 (9th Cir. 1967) The State in *Myers* made an argument almost identical to the state's argument here. *See* Case file in No. 85-6264, Appellee's Brief at 4-6.

We do not hold that jurisdiction afforded by section 2254(a) extends to all constitutional challenges to prior convictions upon a showing of some unfavorable collateral consequence flowing from the challenged conviction. The question presented for our decision is a narrow one, namely, whether the custody requirement for habeas corpus relief is satisfied where a prisoner's prior conviction, although expired, is used to enhance the sentence on a current or future term. We conclude the custody requirement is satisfied in such a case. Where the state uses a prior conviction to enhance a present or future sentence, fairness requires that such restraints on individual liberty be justified. *See Hansley v. Municipal Court*, 411 U.S. 345, 350-51 (1973).

The judgment is REVERSED and the case is REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C85-1943D

ORDER

MARK EDWIN COOK,

Petitioner,

v.

NORM MALENG, et al.,

Respondents.

THE COURT has considered Mark Edwin Cook's petition for writ of habeas corpus and respondent Washington State's motion for dismissal, together with the memoranda submitted by the parties. The Court has also considered the Report and Recommendation of United States Magistrate Philip K. Sweigert and Cook's memorandum filed in opposition to the Report and Recommendation.

The Court approves and adopts the Report and Recommendation. The Court rejects Cook's argument made in opposition to the Report and Recommendation that his 1958 sentence did not expire in 1978. There is nothing in the record which shows that his parole of the 1958 sentence was ever revoked. Thus, that sentence expired in 1978.

THEREFORE, Cook's petition for a writ of habeas corpus is DENIED for lack of subject matter jurisdiction under 28 U.S.C. §2254(a).

The Clerk of the Court is instructed to send a copy of this Order to petitioner, to counsel of record for respondents, and to the above-named Magistrate.

DATED this 19th day of May, 1986.

CAROLYN R. DIMMICK
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C85-1943D

REPORT AND RECOMMENDATION

MARK EDWIN COOK,

Petitioner,

v.

NORM MALENG, et al.,

Respondents.

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner, currently incarcerated at the federal penitentiary in Lompoc, California, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 challenging a 1958 Washington State robbery conviction. Respondents move to dismiss on the ground that petitioner is not "in custody," or in the alternative, that his petition is barred by laches. For the following reasons, I conclude that petitioner is not in custody under §2254(a) and the petition should be denied.

DISCUSSION

Petitioner challenges his 1958 conviction on the ground that he was denied due process when the state allegedly failed to hold a competency hearing. That sentence expired in 1978.

The federal habeas corpus statute, 28 U.S.C. §2254(a), limits the availability of the writ to those persons "in custody pursuant to the judgment of a state court * * *." See also id. §2541(c)(3). Both the statutory authority granted by Congress and the history of habeas corpus require a habeas petitioner to be in custody at the time the petition

is filed. *Carafas v. LaValle*, 391 U.S. 234 (1968); *Tyars v. Finner*, 709 F. 2d 1274, 1279 (9th Cir. 1983).

Petitioner attempts to meet the custody requirement by alleging that his 1958 conviction has been used to enhance his federal sentence currently being served as well as a state sentence for a 1978 conviction which he has yet to serve. Although the scope of the custody requirement has been expanded to include situations falling short of actual, present confinement,[1] no court has gone so far as to bring within the jurisdiction of the writ a petitioner who has fully served the sentence under attack.

Petitioner's arguments regarding the adverse effects of his 1958 conviction go to the issue of mootness, and not to the Court's jurisdiction under §2254(a). In similar situations it has been held that a petitioner who challenged an expired state conviction while in federal custody did not meet the jurisdictional "in custody" requirement of §2254(a). *Ward v. Knoblock*, 738 F. 2d 134, 138-139 (6th Cir. 1984); *Harris v. Ingram*, 683 F. 2d 97, 98 (4th Cir. 1982).

In *Ward*, the Court rejected the argument, as raised by petitioner in the instant case, that the "in custody" language permits prisoners to challenge past confinement:

> "The existence of collateral consequences of [a] conviction may enable a petitioner who has fully served a sentence he wished to challenge to avoid being dismissed on mootness grounds, but it will not suffice to satisfy the 'in custody' jurisdictional prerequisite unless, as in *Carafas* itself, federal jurisdiction has already attached."

Id. 738 F. 2d at 138-139.

Although petitioner is correct in that he has met the "in custody" requirement regarding his 1978 Washington State conviction which he will serve following his release from federal custody, his habeas petition challenges only his 1958 conviction. Even under the most liberal reading of

[1] See *Carafas v. LaValle*, 391 U.S. 234 (1968) (release after filing habeas petition); *Peyton v. Rowe*, 391 U.S. 54 (1968) (future sentence not yet being served); *Jones v. Cunningham*, 371 U.S. 236 (1963) (release on parole).

the "in custody" requirement, it is clear that the petition must be denied because petitioner's sentence expired before he filed this petition.

CONCLUSION

I recommend that the petition for writ of habeas corpus be denied for lack of subject matter jurisdiction under 28 U.S.C. §2254(a).

A proposed form of Order is attached.

DATED this 24th day of March, 1986.

PHILIP K. SWEIGERT
United States Magistrate

APPENDIX D

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding; or

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall pro-

duce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

June 25, 1948, c. 646, 62 Stat. 967; Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105.

APPENDIX E

9.95.040 Board to fix duration of confinement—Minimum terms prescribed for certain cases. The board shall fix the duration of confinement for persons committed by the court before July 1, 1986, for crimes committed before July 1, 1984. Within six months after the admission of the convicted person to the penitentiary, reformatory, or such other state penal institution as may hereafter be established, the board shall fix the duration of his confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense of which he was convicted or the maximum fixed by the court where the law does not provide for a maximum term.

The following limitations are placed on the board or the court for persons committed to prison on or after July 1, 1986, for crimes committed before July 1, 1984, with regard to fixing the duration of confinement in certain cases, notwithstanding any provisions of law specifying a lesser sentence:

(1) For a person not previously convicted of a felony but armed with a deadly weapon at the time of the commission of his offense, the duration of confinement shall not be fixed at less than five years.

(2) For a person previously convicted of a felony either in this state or elsewhere and who was armed with a deadly weapon at the time of the commission of his offense, the duration of confinement shall not be fixed at less than seven and one-half years.

The words "deadly weapon," as used in this section include, but are not limited to, any instrument known as a blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

(3) For a person convicted of being an habitual criminal within the meaning of the statute which provides for man-

datory life imprisonment for such habitual criminals, the duration of confinement shall not be fixed at less than fifteen years. The board shall retain jurisdiction over such convicted person throughout his natural life unless the governor by appropriate executive action orders otherwise.

(4) Any person convicted of embezzling funds from any institution of public deposit of which he was an officer or stockholder, the duration of confinement shall be fixed at not less than five years.

Except when an inmate of the reformatory, penitentiary, or such other penal institution as may hereafter be established has been convicted of murder in the first or second degree, the board may parole an inmate prior to the expiration of a mandatory minimum term, provided such inmate has demonstrated a meritorious effort in rehabilitation and at least two-thirds of the board members concur in such action: *Provided*, That any inmate who has a mandatory minimum term and is paroled prior to the expiration of such term according to the provisions of this chapter shall not receive a conditional release from supervision while on parole until after the mandatory minimum term has expired.